No. 80-11 and 80-15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-11

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, ET AL., *Petitioners,*

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, Secretary of the Interior, *Respondents.*

No. 80-15

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY, *Petitioners,*

v.

JICARILLA APACHE TRIBE, ET AL., AND CECIL ANDRUS, Secretary of the Interior, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT JICARILLA APACHE TRIBE

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On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT JICARILLA APACHE TRIBE

STATEMENT OF THE CASE

Respondent, the Jicarilla Apache Tribe, resides on an Executive Order reservation located in northwestern New Mexico and has an estimated 2,100 inhabitants (75% Indian) with the majority residing in the town of Dulce, New Mexico, near the Colorado border. The reservation contains some 742,315 acres of land all of

which is tribal trust property.[1] 510,747 acres (68.8%) were leased for oil and gas as of October, 1980.[2]

Petitioners are oil and gas lessees of tribal trust land.[3] They operate under leases approved by the Secretary of the Interior pursuant to the Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g (J.A. 62-66, 122). Each Petitioner's lease states:

> The land embraced in this lease issued under the Act of May 11, 1938 (52 Stat. 347), as amended, being within the Jicarilla Indian Reservation. . . .

(J.A. 64).

The leases grant and lease to the lessee "the exclusive right and privilege to drill for, mine, extract, remove, dispose of all oil and natural gas deposits in and under" the leased premises. The term of the lease is for ten years and as long thereafter as oil and/or gas is produced in paying quantities from said land (J.A. 22-23).

The leases reserve to the lessor Indian tribe "the right to lease, sell or otherwise dispose of the surface of the lands" within the leased area. Nevertheless, this disposition is subject at all times to the right of the lessee to use so much of the surface "as is necessary in the extraction and removal of the oil and gas from the land herein described" (J.A. 27).

---

[1] *See* Federal and State Indian Reservations and Indian Trust Areas, U.S. Department of Commerce 1974, at 356, for Reservation area. 1980 population figures are not available.

[2] Report, U.S. Geological Survey, Roswell, New Mexico Office, *Status of Leases and Wells on Indian Lands, South Central Region*, Oct. 1980.

[3] Of those Petitioners who are natural persons, none reside on the Jicarilla Reservation.

The lease attached to the Merrion and Bayless Complaint was issued April 24, 1953 and is still producing (J.A. 22). The lease attached to the Amoco Complaint was issued December 4, 1953 (J.A. 62) and is still producing. Thus, oil and gas lessees on the reservation essentially have unlimited access to the reservation and to the lands leased, with the right of exploration, drilling and operating for an indeterminate term of years, subject only to spacing regulations and such limited environmental controls as may be imposed by the Bureau of Indian Affairs and the United States Geological Survey.

The Tribe is governed by its Revised Constitution which was adopted by a vote of the qualified voters of the Tribe on December 23, 1968 in accordance with Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 (D. Ex.B; R.IV, 98-99). The Revised Constitution as amended was approved by the Undersecretary of Interior on February 13, 1969 (R.II, 707, Finding 25). The tribal government is divided into legislative, executive and judicial branches, with the legislative body being the Tribal Council of eight members elected at large. The elected President or Vice President presides at Council meetings, voting only in event of a tie (D. Ex.B; R.IV, 98).

Article XI of the Tribe's Revised Constitution provides as follows:

> **Section 1.**
>
> The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal

> statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution. (D. Ex.B).

Subparagraph (e) of Section 1, Article XI of the Constitution further provides:

> (e) Taxes and fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation. *Ibid.*

Section 2 of this Article sets forth the procedure of enactment of ordinances which require Secretarial approval. *Ibid.*

The Jicarilla Apache Tribal Council on July 9, 1976 enacted an Oil and Gas Severance Tax Ordinance (J.A. 38-42) and a Severance Tax Permanent Fund Ordinance (D. Ex.D; R.IV, 98-99). The severance tax is expressly imposed on "any oil and natural gas severed, saved and removed from Tribal lands. . . ." (J.A. 38). The measure of the tax is five cents per million BTU of gas, and twenty nine cents per barrel of crude oil or condensate *measured by production from each well on the reservation* (*Id.* at 39-40, paras. 2, 3, 7). Royalty gas "taken by the Tribe in kind, and used by the Tribe" is exempt from the tax (*Id.* at 39, para. 4).

The operator of each well is liable for payment of the tax, and is required to report to the Tribe the volume of oil and volume and BTU content of gas, from each well on tribal lands for each month (*Id.* at 39, paras. 5, 6). There is a provision for tax refunds, payment of taxes under protest with an appeal to the Tribal Council of the Tribe in the event the protestant is dissatisfied with the decision of the Treasurer of the Tribe, and a

provision for "whatever legal action is appropriate under the laws of the United States", if the Tribal Council of the Tribe decides adversely to protestant (*Id.* at 41-42, paras. 11, 12).

The Tribe consents to to be sued either in the United States District Court for the District of New Mexico or the Jicarilla Apache Tribal Court for purposes of enforcement of tax refunds or refund of taxes paid under protest (*Id.* at 42, para. 13). Petitioners declined to pursue the tribal remedies provided; instead, they filed these actions in the District Court.

The Tribal Severance Tax Ordinance and Severance Tax Permanent Fund Ordinance were approved by the Acting Area Director, Bureau of Indian Affairs, on December 23, 1976 as a delegate of the Secretary of the Interior (*Id.* at 129, 143).

Prior to approval of the Severance Tax Ordinance, the Natural Resources Committee of the Tribe considered various alternative tax rates and procedures and made an extensive study of the impact of the severance tax on the consumer. A report prepared by Dr. Alfred L. Parker was made to the Tribe entitled *The Economic Impact of a Proposed Oil and Natural Gas Severance Tax* prior to adoption of the tax (D. Ex.N; R.IV, 133-37 *reprinted in* App. B, Respondents' Appendices to Brief in Opposition to Petition for Certiorari, hereinafter refered to as "Res. App."). This study, and the testimony of Dr. Parker, was the only evidence in the record of probative value as to the impact of the Jicarilla Apache Tax on the consumer. The study concluded that the tribal tax would increase the cost of gas to New Mexico consumers by 6/10 of 1 cent per MCF, and to interstate consumers by 1/10 of 1 cent per MCF. Since oil production on the Reservation is not large, 411,884

barrels in 1974 (D. Ex.N at 4), Dr. Parker concluded that the impact on oil prices was "very small indeed" (*Id.* at 5). The study concluded, on the basis of 1975 oil and gas production, that the impact on both interstate and intrastate consumers of oil and gas will be minimal, assuming that the tax is passed on to consumers.

The Court's finding that the combined state and tribal tax burden would amount to more than 29% of the interstate price of old gas and over 12 1/2% of the price of old oil (J.A. 130, Finding 36) was not substantiated. Petitioners' witness, Dugan, testified that the State of New Mexico tax on old gas was approximately 6.7%, and the new Jicarilla proposed tax would be 13.6%, for a total of 20.4% on old gas (R. IV, 58). He testified that as a small producer, he was entitled to a sales price of 30% above the 29.5 cent price (*Id.* at 57). No evidence was offered by Petitioners as to the ratio of small producers' gas or new gas to total gas produced on the reservation, or the relationship of the tax to the price paid by the consumer. The tax is only one component of all elements which are included in the cost of service of gas (R.VI, 290, Parker testimony; *see* p. 65 *infra*).

The finding of the District Court and the argument of the Petitioners that if producers were required to absorb the taxes, it would substantially limit their ability to operate profitably some existing wells (J.A. 130, Finding 34), was also not supported by the evidence. It was directed to the burden of the tax on oil production, but on cross-examination Mr. Dugan testified only as to one "marginal" well which was a *gas*, not an oil well (R.IV, 63-64). As to gas wells, he conceded he could pass on to the pipeline purchaser all of the tax (*Id.* at 55). The lease requirement as to production in paying quantities is

directed to production on the whole *lease*, not to single wells. Thus, the entire line of testimony proves nothing.

The Court's finding and the arguments of Petitioners as to the burden of the Jicarilla tax on oil and gas production is presently entirely without meaning and will be meaningless in the future because of deregulation of oil prices and provisions of the Natural Gas Policy Act of 1978 permitting the pass through of Indian severance taxes in determining natural gas ceiling prices (15 U.S.C. §3320; *see* p. 50; n. 36 *infra*).

The Tribe tendered substantial testimony and exhibits to establish that the tribal severance tax is a reasonable governmental means for the support of tribal government, preservation of the economy, and enhancement of the welfare of the Tribe, by providing revenues to supplement tribal income, particularly when the oil and gas resource is depleted and royalty payments diminish and cease.

The Affidavit of Richard TeCube, a member of the Tribal Council of the Tribe, was tendered to establish the substantial expenditures by the Tribe for law and order, fire protection, public work services, maintenance of roads and community center activities, which benefit non-tribal members, including Petitioners, as well as tribal members. This tender was denied admission (D. Ex.AA; R.VI, 306). These expenditures were also shown in Defendant's Exhibit P which was tendered to the Court but denied admission (R.VI, 278-90). That exhibit showed a tribal budget of $3,958,201 in fiscal 1976. Direct contributions to the tribal budget by the State of New Mexico were only $248,562 in that fiscal year (D.Ex.T; R. VI, 278-90).

The Tribe offered evidence as to operation by the tribal government of a police force of more than 20

uniformed policemen with a budget paid out of tribal funds of $184,168 in fiscal 1976, compared to one state police officer whose budget was $11,000 (R. VI, 301-02); evidence that would have established that the Tribe furnished various services, including the operation of a community center open to Indians and non-Indians (*Id.* at 302-03); and testimony as to operation of a game and fish department, which department collected state hunting and fishing license fees as well as tribal fees, and a Tribal Court with jurisdiction over criminal and civil matters involving tribal members (*Id.* at 303-05).[4] These tenders were objected to by Petitioners as irrelevant (*Id.* at 281) and denied by the Court (*Id.* at 305-06, Res. App.A).

The Brief of *Merrion and Bayless, et al.* in No. 80-11 will be referred to as "M&B Br."; the Brief of *Amoco Production Co., et al.* in No. 80-15 will be referred to as "Amoco Br."

SUMMARY OF ARGUMENT

Respondent submits that the authority of the Jicarilla Apache Tribe to levy a severance tax on production of oil and gas, imposed on non-Indians operating under leases approved by the Secretary of Interior on the Tribe's reservation, is a sovereign power of the Tribe which has never been successfully questioned. The power to impose this severance tax is based on the inherent sovereignty of the Tribe, reaffirmed by the Indian Reorganization Act. Moreover, the question of tribal

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[4] Exhibit P showed major tribal expenditures in 1976 for services which benefitted Petitioners as well as tribal members. Petitioners surely recognize, despite the smoke screen which they spread over the issues, that without a strong tribal government and maintenance of law and order, they would be unable to operate.

sovereign power to tax has been resolved by this Court in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, _____ U.S. _____, 100 S.Ct. 2069 (1980). The tax in this case cannot be distinguished from *Colville* in view of the repeated decisions of the courts and the opinions of the Attorney General of the United States acknowledging tribal power to tax non-Indian activities taking place on property situated on Indian trust lands, particularly where the Tribe has a significant interest in the subject matter.

The Jicarilla Apache tribal leases were issued under the 1938 Leasing Act, 25 U.S.C. §§396a-396g, and therefore the statutory authority of states to tax under the 1927 Leasing Act is irrelevant. Arguments of Petitioners that the power of tribal taxation of oil and gas production has been divested by the General Leasing Act of March 3, 1927, 25 U.S.C. §§398a-398e, are unsupported by the history of the leasing acts. Nor do the Mineral Leasing Act regulations authorized by Congress divest tribes of their sovereign powers of taxation.

Petitioners argue that the Jicarilla Apache severance tax is inconsistent with interests of the national government and particularly a national energy policy. If, in fact, there is a viable national energy policy, no conflict has been shown between the tribal tax and that policy. Moreover, Congress has expressly recognized Indian severance taxes in the Natural Gas Policy Act of 1978, Pub. L. 95-621, Title I, §110, 15 U.S.C. §3320.

Lastly, Petitioners argue that the Jicarilla Apache tribal severance tax violates the Commerce Clause of the Constitution. The Tribe submits that the Indian Commerce Clause provides the proper framework within which to test the tribal tax. The Indian Commerce Clause had as its purpose the protection of Indians from

outside trade interference and alienation of their lands without the consent of Congress. The Indian Commerce Clause does not in itself impose any implied restraints on Indian taxation. It is necessary to look, therefore, to specific legislation to determine whether Congress has in any way acted to restrict tribes' sovereign powers to tax. Congress has not done so. Rather, Congress has acted to affirm tribal power to tax activities of non-Indians on reservations.

Judging the Jicarilla Apache severance tax by criteria hertofore applied by this Court under the Interstate Commerce Clause to similar taxes on production of oil, gas and minerals, the tax does not constitute a prohibited multiple burden on interstate commerce. The activity taxed has a substantial nexus on the reservation; there is no discrimination in favor of tribal or other local business; and the tax is reasonably related to the services rendered by the tribal government, both to Indians and non-Indians.

ARGUMENT I

The Jicarilla Apache Tribe's Sovereign Power To Tax Extends To Severance Taxes On Production Of Oil And Gas On The Jicarilla Apache Reservation

A. *The Jicarilla Apache Tribe Has Power to Impose A Severance Tax on Oil and Gas Production on the Reservation by Reason of Its Inherent Sovereignty.*

The Jicarilla Apache severance tax is imposed on the act or privilege of producing or severing oil or natural gas on the Tribe's reservation and is measured by production at the wellhead. It is a common form of tax that is levied and assessed by numerous governmen-

tal entities. *See* nn. 37, 41, 45, *infra.* A similar New Mexico severance tax was so defined and upheld in the case of *Flynn, Welch & Yates* v. *State Tax Commission*, 38 N.M. 131, 136-37, 28 P.2d 889, 891-92 (1934).

Petitioners and Amici argue that tribal power to tax extends only to members of the Tribe and, therefore, the only authority to tax or regulate nonmembers of the Tribe is based on the power of the Tribe to exclude nonmembers from the reservation.[5]

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[5] Petitioners and Amici seek to overturn 75 years of historical and legal precedent confirming the general sovereign power of the tribes to tax by citing dicta, dissenting opinions, taking language of opinions of the Attorneys General out of context, and omitting significant portions of quotations to support a doctrine which this Court has never espoused. Merrion and Bayless Petitioners confuse the doctrine of limited sovereignty of a "domestic dependent nation" (*Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)) with the lack of recognition of any governmental authority over non-Indians (M&B Br. at 13-14). Petitioners in that brief cite Justice Baldwin's "concurrence" in *Cherokee Nation* apparently seeking to convince this Court that Justice Baldwin agreed with the majority of the Court with respect to retention by a dependent nation of certain sovereign powers as set forth in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832):

> [A] weaker power does not surrender its independence — its right to self-government, by associating with a stronger and taking its protection.

On page 15 of the their Brief, the Merrion and Bayless Petitioners quote from *Choctaw Nation* v. *United States*, 119 U.S. 1, 27 (1886), emphasizing the statement that the Choctaw Nation falls within the description "not of an independent State or sovereign Nation, but of an Indian Tribe." Omitted are the next sentences stating that "[a]s such it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should

Arguments of the oil companies that the power to tax activities of non-Indians on tribal lands is not a part of the retained sovereignty of an Indian tribe, but rather an attribute of the tribe's power as a landowner to exclude non-Indians were expressly rejected by this Court just last term in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 100 S.Ct. 2069 (1980). Relying on judicial precedents and opinions of the executive branch spanning 125 years, [6] this Court confirm-

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choose, as it did determine in the act of March 3, 1871, embodied in §2079 of the Revised Statutes, to exert its legislative power."

Similarly, the M&B Brief on page 16 quotes from Justice Rehnquist's opinion in *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978), citing a 1960 Senate Report and stating "*[t]his is by reason of the fact that Indian tribal law is enforceable against Indians only; not against non-Indians.*" 435 U.S. at 205. Petitioners omit the sentence following: "Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges." *Id.* at 205-06.

Petitioners seek to convince this Court that *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978) recognizes a complete "divesture [sic] of tribal sovereignty" with respect to tribal relations with non-Indian society (M&B Br. at 16). However, Petitioners omit the sentence following the quote: "Thus Indian tribes can no longer fully alienate to non-Indians the land they occupy." Similarly, on page 17 of that brief, again quoting from *Wheeler*, Petitioners, in arguing a conclusion of general limitation of powers of self-government, fail to mention the three specific limitations on powers of self-government referred to in the quotation of Justice Stewart: (1) alienation of lands; (2) relations with foreign nations; and (3) trying non-members in tribal courts.

[6] The existence of these authorities refutes the Petitioners' complaint that they had no way of knowing that the Jicarilla Apache Tribe might impose taxes on their leases (Amoco Br. at 13 n. 12).

ed in *Colville* that the power to tax "is a fundamental attribute of sovereignty", rejecting the arguments that the tribes in question lacked governmental power to impose a tax on nontribal purchasers. The Court held:

> At the outset, the State argues that the Colville, Makah, and Lumini Tribes have no power to impose their cigarette taxes on nontribal purchasers. (footnote omitted). We disagree. The *power to tax transactions occurring on the trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain* unless divested of it by federal law or necessary implication of their dependent status. (emphasis supplied) *Id.* at 2080-81.

The sovereignty of the Apache tribes in New Mexico was recognized by officials of the United States who commenced negotiation of treaties with tribal chiefs the year after ratification of the Treaty of Guadalupe Hidalgo (February 2, 1848).[7] These actions are inconsis-

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See also F. Cohen, *Federal Indian Law*, 142 (U.N.M.ed.) which states:

> That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or Act of Congress is a proposition which has never been successfully disputed (footnote deleted).

and further that:

> The power to tax does not depend upon the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the tribal jurisdiction. *Id.* at 143, *citing Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

[7] *See Jicarilla Apache Tribe* v. *United States*, 12 Ind. Cl. Comm. 439, 453 (1963), Finding 28. *See* Brief in Opposition to Petition for Certiorari of Respondent Jicarilla Apache Tribe, at 25-29. That Spanish officials also recognized the sovereignty of hunting tribes of Indians is confirmed in the treaty between Governor Anza

tent with Judge Seth's theory, also advanced by Petitioners, that "there were no vestiges preserved of any governmental powers in the Indian groups of New Mexico who did not occupy pueblos." *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 551 (1980), *reprinted in* J.A. 168.

This Court in *Colville* cited with approval *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), wherein the inherent tribal power to tax was first clearly upheld. In that case the Plaintiffs, who were traders doing business on town sites they had purchased within the boundaries of the Creek Nation, sought to enjoin officers of the Indian Nation and of the Interior Department from closing down their business and ousting them for nonpayment of Indian imposed taxes.

A 1902 statute had made it unlawful to remove or deport these persons from Indian territory. The Court of Appeals stated on page 950:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement

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of New Mexico and the Comanches in the Spanish-Comanche Peace Treaty of 1786. The Treaty was entitled "Articles of Peace Agreed Upon And Arranged In The Villa of Santa Fe And The Pueblo Of Pecos Between Colonel Don Juan Bautista de Anza, Governor of the Province of New Mexico, and the Comanche Captain, Ecueracapa, Commissioner-General of this Nation on the days 25th and 28th of February of 1786." A.B. Thomas, Forgotten Frontiers, 329 (1st ed., 1932).

> of the nation itself or by the superior power of the republic it is taken from it.

The Court went on to say that,

> . . . every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself. *Ibid.*

It is significant that the Plaintiffs in that case were purchasers of lots within the Creek Nation who therefore had valuable property interests, the value of which depended upon the ability of the owners to transact business on the premises. The case clearly holds that the taxes levied by the Creek Nation did not unlawfully impair Plaintiffs' property rights, nor were such taxes dependent on the power to exclude. The Court said:

> The conclusion necessarily follows that the prohibition of the deportation of noncitizens from the Indian Territory by the act of 1902 neither repealed nor annulled the permit laws of the tribes, nor deprived the Secretary of the Interior and the defendants of the authority to enforce them by preventing their violators from continuing their unlawful business after they had refused to pay the taxes. *Id.* at 957.

The Court continued:

> The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns, and that the Secretary of the Interior and his subordinates may lawfully enforce those laws by closing the business

> of those who violate them, and thereby preventing the continuance of that violation. *Id.* at 958.

Thus, the power to tax was upheld where there was no power in the Tribe to remove the taxpayer from the tribal jurisdiction.

In *Maxey* v. *Wright*, 54 S.W. 807 (1900), *aff'd.*, 105 F. 1003 (8th Cir. 1900), a license tax on attorneys practicing in Creek territory was upheld. Similarly, a tax levied by the Chickasaw Nation on cattle owned by non-Indians and grazed on private land within the tribal boundaries was upheld in *Morris* v. *Hitchcock*, 194 U.S. 384 (1904).

In the latter case this Court stated, referring to earlier Chickasaw legislation:

> The law in question seems to have a twofold object, — to prevent the intrusion of unauthorized persons into the territory of the Chickasaw Nation, and to raise revenue. 194 U.S. at 389, *citing* a report made to the Senate by a Committee on the Judiciary on February 3, 1879.

The first object was to impose a license or fee to be paid to the Tribe pursuant to the Tribe's power to exclude. The second object was to impose a tax levied to help support the Tribal government pursuant to the Tribe's inherent power to tax. The Court upheld both as proper. The Court also noted with approval a similar impost by the Cherokee Nation:

> And in the last-mentioned opinion it was, in substance, declared that, under §16 of the Curtis act, the Secretary of the Interior had authority to collect a tribal tax imposed by the laws of the Cherokee Nation of Indians upon the exportation of prairie hay from that nation, and that the tax was just as applicable to hay raised upon lands occupied by individual members of the nation, as their share

> of the public domain, pending allotments, as in any other case, and would be so even if the shipper was the absolute owner of the land on which the hay was raised. 194 U.S. at 392.

The Chickasaw tax, approved June 3, 1902, was *retroactively* applied to stock within Chickasaw territory "since January 1, 1902," thus the imposition of the tax was strikingly similar to the severance tax now in issue. *Id.* at 385 n.1.

This Court in *Colville* also relied on *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), in which non-Indians were taxed for the privilege of grazing cattle on land within the reservation. In affirming the power of the Tribe to levy the tax on non-residents, the Court in *Iron Crow* cited with approval F. Cohen's *Federal Indian Law (U.N.M.ed.), see* n.6 *supra,* and continued as follows:

> Inasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty. The tribe has seen fit to give orderly implementation to that power through the adoption of a constitution which, among other things, has specifically provided for the levy of taxes. Such action was taken in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C.A. §476.
>
> We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, supra, that such power still exists. *Iron Crow*, 231 F.2d at 99.

In *United States* v. *Mazurie*, 419 U.S. 544 (1975), this Court recognized the power, delegated by Congress, of the Wind River Tribes to regulate non-Indians doing business in "Indian country". The Court upheld a Wind River ordinance which required all retail liquor outlets within Indian country to obtain both tribal and state licenses, thus reaffirming the Tribe's sovereignty over its territory and power to license non-Indians.

In *Barta* v. *Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1958), the Court of Appeals, relying on *Iron Crow*, upheld a tax on nonresident lessees on tribal lands in the face of an assertion that the tax deprived the defendants of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States. This case supports the Tribe's contention and the Circuit Court decision below that Indian tribes may levy taxes on nonresidents with existing leases who could not legally be removed from tribal lands.

Petitioners also argue that tribal taxation is inconsistent with the Tribe's dependent status, relying on *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978), and *United States* v. *Wheeler*, 435 U.S. 313 (1978). This view of the concept of tribal dependence was rejected by this Court in *Colville* where it made clear that dependency was merely indicative of tribes' relationship to the federal government, but did not in itself restrict tribal sovereignty.

> Tribal powers are not implicitly divested by virtue of the Tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the Tribes seek to engage in foreign relations,

> alienate their land to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. *Colville*, 100 S.Ct. at 2081.

Only in the three specific circumstances mentioned has the exercise of tribal power been restricted in the past.

Wheeler, 435 U.S. at 323, rather than supporting Petitioners' arguments, outlines the proper framework within which to consider Indian sovereignty, consistent with the decision of the Court of Appeals here. The consideration is not what power Congress has granted to Indian tribes; the concern is what power Congress has removed. This Court stated:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status (*citing Oliphant*).

As pointed out by this Court in *Wheeler* and *Colville*, a divestiture of tribal sovereignty will only be considered in extreme circumstances where the United States Constitution mandates protection of U.S. citizens who are sought to be prosecuted in tribal courts; or the United States' trusteeship over Indians restricts alienation of their lands; or the sovereign interests of the National Government preclude the exercise of equivalent foreign treaty-making powers of tribes. *Wheeler*, 435 U.S. at 326; *Colville*, 100 S.Ct. at 2081.

In considering the imposition of a tribal tax on non-Indians in the *Colville* case, this Court stated that "we can see no overriding federal interest that would necessarily be frustrated by tribal taxation." *Colville*, 100 S.Ct. at 2081.

Petitioners and Amici also rely extensively on *Oliphant* as restrictive of tribal sovereignty to tax nonmembers doing business on the reservation. This case cannot be read so broadly as to invalidate the tax in question in this case.

Oliphant involved the exercise of *criminal* jurisdiction over a nonmember of the Tribe and did not involve a tribe's sovereign taxing power. The Court explicitly limited its holding by stating "[t]he case before us is concerned only with the criminal jurisdiction of tribal courts." *Oliphant,* 435 U.S. at 196 n.7. The Court stated that "[t]he history of Indian treaties in the United States is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress." *Id.* at 197 n.8.

The rationale of *Oliphant* does not support the conclusion that Indian tribes do not have civil and taxing jurisdiction over non-Indians transacting business on the reservation. As stated by this Court in *Colville*:

> Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activities. [*citing, Buster* v. *Wright, Iron Crow* v. *Oglala Sioux Tribe*, and *Morris* v. *Hitchcock*]. In these respects, the present cases differ sharply from *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians. 100 S.Ct. at 2081.

Petitioners also argue that the tax in this case is distinguishable from the taxes approved by this Court in *Colville*, first, because it is levied on production pursuant to leases which have been granted to Petitioners on specified terms which they argue cannot be changed without their consent; and second, because the Tribe as a property owner has no right to change the conditions of Petitioners' contracts on the Reservation. The Court of Appeals disposed of this argument as follows:

> The leases themselves contain a provision that no change may be made in the rate of "royalty or annual rental" without written consent of the parties to the lease. *But as lessees acknowledged at oral argument, such a provision does not preclude a sovereign that is also a lessor from imposing a tax which has the practical effect of increasing its revenues.* It is well settled that such an agreement does not prevent the exaction of a license tax "unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation." *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 549 (10th Cir. 1980), *reprinted in* J.A. 161 (emphasis added).

Thus, if the Tribe's power to tax is recognized, this argument fails.

The cases cited by Petitioners, *Puerto Rico* v. *Russell & Co.*, 315 U.S. 610 (1942) and *Murray* v. *Charleston*, 96 U.S. (6 Otto.) 432 (1878) are not on point. They hold that a special tax may not be levied for the purpose of relieving a government of its indebtedness (*Murray*) nor can special assessments be imposed for maintenance and operation where earlier contracts had exempted the Respondents from contributing to such costs (*Puerto Rico*). This Court in *Wells* v. *Savannah*,

181 U.S. 531 (1901) and again in *Puerto Rico* made clear that general taxes for the support of government could only be avoided by clear proof of a valid contract of exemption from such payments. *See also Providence Bank* v. *Billings*, 29 U.S. (4 Pet.) 514 (1830); *New York City Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573 (1938). The Jicarilla Apache Tribe never exempted Petitioners or waived its power to tax either expressly or impliedly.

B. *The Tribe's Power To Tax Is Directly Reaffirmed By The Indian Reorganization Act.*

The Constitution of the Tribe adopted pursuant to the Indian Reorganization Act and approved by the Secretary of Interior expressly provides for taxation of non-Indians doing business on the reservation (Art. XI, Sec. 1(e); *see* p. 4 *supra*). The Indian Reorganization Act of 1934 was a statement of a new policy toward Indian tribes. The Indian Allotment Act had failed. Indians were not being assimilated into the "white culture" and were dissatisfied with government services and with their inability to control their own affairs. *See* Hearing before the Committee on Indian Affairs, February 27, 1934, United States Senate, S.B. 2755.

The purpose of the Act is stated on its face:

> A Bill to grant Indians living under Federal tutelage the freedom to organize for *purposes of local self-government* and economic enterprise . . . to *conserve* and develop Indian lands. . . . (emphasis added)

Section 16 of the Act was intended to reinforce existing tribal powers and to strengthen tribes as govern-

mental units. An opinion of Solicitor Marigold of the Interior Department stated in 1934:

> My opinion has been requested on the question of what powers may be secured to an Indian tribe and incorporated in its constitution and by-laws by virtue of the following phrase, contained in section 16 of the Wheeler-Howard Act (48 Stat. 984, 987):. . . . In addition to all powers vested in any Indian tribe or tribal counsel by existing law, . . . the constitution adopted by said tribe shall also vest. . . . (55 I.D. 14, 17).

Solicitor Marigold concluded:

> I conclude that under Section 16 of the Wheeler-Howard Act (48 Stat. 984) the "powers vested in any Indian tribe or tribal council by existing law", are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the following:
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> * * *
>
> 5. To levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders. (*Id.* at 65-66).

This Solicitor's Opinion written in the year the legislation was passed is the best available indication of Congressional intent. *See Squire* v. *Capoeman*, 351 U.S. 1, 9 (1956). Congress, in the 43 years since its adoption, has taken no steps to amend the Act to limit tribal powers as defined by Solicitor Marigold. Thus the administrative interpretation of the Indian Reorganization Act expressed by the Solicitor, must be deemed to have been accepted by Congress.

The view is supported by this Court in *Colville*, as follows:

> To the contrary, authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by §16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. §476. 100 S.Ct. at 2081.

It is submitted that the Court of Appeals was correct in finding no essential difference between the privilege tax here levied and those approved by the Eighth Circuit in *Barta* v. *Oglala Sioux Tribe* and *Iron Crow* v. *Oglala Sioux Tribe*, and by this Court in *Morris* v. *Hitchcock* and *Colville*.

ARGUMENT II

Power Of The Jicarilla Apache Tribe To Impose This Severance Tax Has Not Been Divested

A. *The Doctrine of Preemption Applies Only To Taxation or Regulation By States, Not Indian Tribes.*

Merrion and Bayless Petitioners and Amici oil companies erroneously apply the doctrine of federal preemption to the Tribe's taxing authority but cite no relevant cases in support of their arguments. This Court has only applied the doctrine in cases questioning the authority of *states* to tax or regulate activities on Indian reservations.[8]

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[8] *See, Central Machinery* v. *Arizona State Tax Commission*, _____ U.S. _____, 100 S.Ct. 2592, 2596 (1980); *White Mountain Apache Tribe* v. *Bracker*, _____ U.S. _____, 100 S.Ct. 2578, 2588 (1980); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S.

There are no cases in which this Court or any lower federal court has applied the doctrine of preemption to such activities by Indian tribes on reservation lands.

The federal preemption standard as applied to states has it origins in the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl.2). In general terms, if the federal government has acted to "occupy the field" a state's activity in the same field may be restricted under the preemption standard.[9] Specifically concerning state activities on Indian lands, this Court stated in *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 172 (1973):

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. (footnote and citation omitted) The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to applicable treaties and statutes which define the limits of state power.[10]

164, 172 (1973); *Moe* v. *Salish and Kootenai Tribes*, 425 U.S 463 (1976); *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685, 689 (1965); *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Bryan* v. *Itasca County*, 426 U.S. 373, 376 (1976); *Antoine* v. *Washington*, 420 U.S. 194, 204 (1975).

[9] *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *DeCanas* v. *Bica*, 424 U.S. 351, 355-56 (1976); *Pennsylvania* v. *Nelson*, 350 U.S. 497, 501-02 (1955); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

[10] Footnote 7 of this Court's opinion in *McClanahan* v. *Arizona*, 411 U.S. at 171, identifies federal authority over Indian matters as the Commerce Clause while footnote 17 of *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. at 481, states that the basis for invalidating state taxing measures found inconsistent with federal law is the Supremacy Clause.

On the other hand, when reveiwing the nature and extent of tribal regulatory or tax authority, this Court has relied upon the basic legal concept of inherent tribal sovereignty. As recently stated by this Court in *White Mountain Apache Tribe* v. *Bracker*, _____ U.S. _____, 100 S.Ct. 2578, 2583 (1980):

> The unique historical origins or [sic] tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law.

The judicial standard applied in defining the exterior boundaries of tribal sovereignty is Congress' plenary power to regulate Indian affairs which has its roots in the Commerce Clause of the United States Constitution (U.S. Const., art. I, §8, cl.3).[11] This Court has then looked to determine whether Congress has affirmatively acted to specifically divest or limit a tribal government's sovereignty. As framed by this Court in *Washington* v. *Colville*, 100 S.Ct. at 2080-81:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by

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[11] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *United States* v. *Kagama*, 118 U.S. 375 (1886); *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975).

federal law or necessary implication of their dependent status.

The Court also stated:

> While the Tribes have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. *Id.* at 2083.

It is therefore submitted that there is no legal theory supported by precedent upholding the argument that Congress in enacting either the 1927 or 1938 Leasing Act has preempted Indian tribal taxation. The correct question to be entertained by this Court is whether Congress in its exercise of its plenary power over Indian affairs has acted to divest the Jicarilla Apache Tribe's authority to tax non-Indian lessees on the reservation for the privilege of extracting the Tribe's valuable non-renewable resources.[12]

B. *Any Divestiture of Inherent Tribal Sovereignty Must Be Expressly Legislated By Congress.*

Respondents have established the inherent sovereign authority of Indian tribes to tax mineral resource development on their lands (*See* Argument I, *supra*). This inherent authority need not be confirmed by Con-

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[12] *Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra; Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *United States* v. *Wheeler*, 435 U.S. 313 (1978).

gress; it exists as part of the inherent sovereign power of the tribe, unless and until that sovereign right is expressly limited or divested by Congress. It is well settled that divestiture of Indian sovereign rights will not be lightly inferred but will only occur where Congress has explicitly and unambiguously manifested an intention so to limit them.

Moreover, "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe* v. *Bracker*, 100 S.Ct. at 2583-84. An example of this policy interpreting statutes in such a manner is that "[t]he canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their predjudice." *Antoine* v. *Washington*, 420 U.S. 194, 199 (1975); *see also Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) and *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912).

A more recent example of judicial reluctance to interpret ambiguous congressional acts to the detriment of tribal sovereignty is this Court's decision in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). In that case the question presented was whether an action could be maintained against a tribal officer in federal court to enforce a restriction upon tribal governments imposed by Title I of the Indian Civil Rights Act, 25 U.S.C §§1301-1303 (1976). While the Act imposed a number of statutory limitations upon tribal governments, it provided only one express remedy, the *writ of habeas corpus* in federal court to test the legality of a detention, which was not an appropriate remedy for the plaintiff in *Santa Clara*.

While noting that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess", the Court also observed that it has "frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms." *Santa Clara*, 436 U.S. at 56, 61. Nonetheless, the Court stated that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." (*Id.* at 60). This Court found competing purposes in the Indian Civil Rights Act — both the "objective of strengthening the position of individual tribal members vis-a-vis the tribe," and the objective of promoting "the well-established federal 'policy of furthering Indian self-development' " — and therefore refused to imply a cause of action (*Id.* at 62).

Where the sovereign powers of an Indian tribe may be affected, this Court has required absolutely clear indications of Congressional intent before it will intrude upon tribal autonomy. *See, e.g., Ex Parte Crow Dog*, 109 U.S. 556 (1883); *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

The case of *Bryan* v. *Itasca County*, 426 U.S. 373 (1976) presented a question almost identical to that raised by the Petitioners in the case at hand (Amoco Br. at 16-23); that is, does a general statute granting civil jurisdiction to states over non-Indians on reservation lands divest a tribe of an important attribute of sovereignty, in that case sovereign immunity from taxation? In *Bryan*, a Minnesota county sought to tax unrestricted property of a reservation Indian. Congress had enacted Public Law 280, a statute that by its express terms broadens state jurisdiction over matters in Indian

country subject to the Act. *See* 18 U.S.C. §1162; 25 U.S.C. §§1321-1326; 28 U.S.C. §1360. The statute provides that state "civil laws . . . of general application to private persons or private property" shall aply to those areas of Indian country subject to the Act. 25 U.S.C. §1322; 28 U.S.C. §1360. The Act expressly excepts from this application state taxation of trust or restricted Indian property. 25 U.S.C. §1322(b); 28 U.S.C. §1360(b). Minnesota claimed that its property tax law was a civil law of general application and that the express exception of the right to tax trust or restricted Indian property implied the right to tax unrestricted property.

This Court rejected both arguments, pointing out that the statute "does not in terms" authorize state taxation of anything. *Bryan,* 426 U.S. at 378. The Court applied the "eminently sound and vital canon" that ambiguities in Indian legislation are to be construed in the Indians' favor. *Id.* at 392. Furthermore, the Court declared that "[t]his principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities." *Ibid.* Finally, the Court concluded that:

> "Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the . . . Act. This being so, we are not inclined to infer an intent to terminate. . . . A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." (*Id.* at 393, *citing Mattz* v. *Arnett*, 412 U.S. 481 (1973)).

In the case at hand, Petitioners assert that the 1927 Leasing Act, which authorized states to levy taxes upon non-Indian lessees, divests the tribe of its sovereign

powers to tax. Under the rule in *Bryan*, this cannot be inferred in the absence of express statutory language.

C. *The Jicarilla Apache Tribal Leases Were Issued Under the 1938 Leasing Act And Therefore The Statutory Authority of States To Tax Under The 1927 Leasing Act is Irrelevant.*

All of the leases in this case were issued pursuant to the Act of May 11, 1938, 25 U.S.C. §§396a-396g. The lease attached to the Amoco Complaint (J.A. 64-66) provided in the "Forest and Land Protection Stipulations," which were an integral part of all leases, as follows:

> The land embraced in this lease issued under the Act of May 11, 1938 (52 Stat. 347), as amended, being within the Jicarilla Indian Reservation, the lease [sic] hereby agrees: . . . .

See also, certificate of Harold TeCube, the Jicarilla Agency Realty Officer, Bureau of Indian Affairs, filed with the Tribe's Motion for Leave to Amend Answer (J.A. 122).

Unlike the acts of 1919 through 1927 discussed below, the 1938 Act applies to all categories of Indian reservations in all states, excepting two reservations and two former reservations named in 25 U.S.C. §396f. Unlike the 1924 and 1927 Acts, the 1938 Act does not consent to state taxation. The Act applies to all leases entered into "On and after May 11, 1938" of unallotted reservation lands. 25 U.S.C. §396a.

Petitioners have argued that the tax consent in the 1927 Act (25 U.S.C. §398c) should apply to leases made under the 1938 Act. Based on the history of the comprehensive 1938 Act, this argument should be rejected.

Prior to 1938, Congressional enactments in 1916, 1919, 1920 and 1924 left the law relating to the leasing of tribal lands for mining purposes in a "patch-work state." F. Cohen, *Federal Indian Law, supra*, at 328. Acknowledging the confusion in the various Indian Leasing Acts, the Acting Secretary of Interior, Charles West, on June 17, 1937, transmitted to the House and Senate, a proposed comprehensive bill to govern the leasing of Indian lands for oil and gas and other minerals. *See* H.R. Rep. No. 1872, 75th Cong. 3rd Sess. (1937). The Acting Secretary stated on page 3 of the Report:

> The attached draft of bill, it is believed would be a more satisfactory law for the leasing of Indian lands for general mining purposes. It will bring all mineral leasing matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted.

As to the patchwork state, Cohen stated: "[t]his condition was remedied on May 11, 1938, by the enactment of comprehensive legislation governing the leasing of tribal lands for mining purposes." F. Cohen, *supra*, at 328.

Section 1 of the 1938 Act, 25 U.S.C. §396a, provides for leasing of tribal lands for oil, gas or mining purposes "by authority of the tribal council or other authorized spokesmen for such Indians". Section 2 of the Act, §396b, provides for sale at public auction under terms and conditions prescribed by the Secretary and includes a further important addition as follows:

> *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes *as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 475, 476-478 and 479 of this title.* (emphasis added).

Section 7 of the 1938 Act includes an express provision that: "All Acts or parts of Acts inconsistent herewith are hereby repealed." (Section 7 is uncodified but is set out in Historical Note after 25 U.S.C. §396a). This clause was surely intended to repeal the hodgepodge of prior leasing acts.[13]

The current federal regulations governing leases of tribal lands for mining (including oil and gas), 25 C.F.R. Part 171, refer only to the 1938 Act and the Indian Reorganization Act as statutory authority for the regulations. The 1927 Act is not cited.[14]

Petitioners assert that the tax provision alone of the 1927 Act should survive, but as indicated below, that provision was an integral part of the 1927 leasing authority, and its retention is inconsistent with the purposes of the 1938 Act. Also, there is a more specific inconsistency. The 1927 Act provided for the deposit of royalties in the Treasury to the credit of the Tribe, and for payment of the state tax out of such tribal deposits. 25 U.S.C. §§398b, 398c. The 1938 Act, however, allows payment of royalties directly to the tribes.

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[13] The repealer clause did not immediately eliminate the prior laws. The 1938 Act applies only to all leases entered "On and after May 11, 1938." 25 U.S.C. §396a. The prior statutes continued to govern leases made under them so long as production continued.

[14] The headnote following the Table of Contents of 25 C.F.R. Part 171 states:

> AUTHORITY: Secs. 16, 17, 48 Stat. 987, 988, sec. 9, 49 Stat. 1968, sec. 4, 52 Stat. 348; 25 U.S.C. 396d, 476, 477, 509. Interpret or apply secs. 1, 2, 49 Stat. 1250; 48 U.S.C. 358a, 362, unless otherwise noted. SOURCE: 22 FR 10588, Dec. 24, 1957, unless otherwise noted.

Consistent with that provision of the 1938 Act, paragraph 3(c) of the Standard Lease Form dated November, 1947, attached to both the Amoco and Merrion and Bayless Complaints, provides that all rental and royalty payments, except as provided in Section 4(c) (royalty in kind), "shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day check or draft is issued, to the order of the treasurer of said tribe or the superintendent." (J.A. 25). A footnote to Section 3(c) specifies that payment is made to the superintendent only where the Tribe concerned is not organized under the Indian Reorganization Act (*Ibid.*).

The Constitution of the Jicarilla Apache Tribe provides that the Tribal Council is responsible for management of all funds within the control of the Tribe and may appropriate available tribal money for public purposes. (D. Ex.B; R. IV, 99-100, Res. App. E at 28) Thus, since rentals and royalties are paid directly to the Tribe and not deposited in the United States Treasury, there is no money with which to pay state taxes imposed on Indian royalties pursuant to the provisions of the 1927 Act. This is clear from the proviso of that section that "such taxes shall not become a lien or charge of any kind against the land or other property of such Indians." 25 U.S.C. §398c. Indian royalties or other interests in production under 1938 Act leases are thus not subject to state taxation.

The emphasis of the 1938 Act was to provide for issuance of oil and gas leases by the tribes. There was

neither a requirement that the monies generated by royalties be paid into the U.S. Treasury nor authorization for taxation by the states of production from lands leased under the Act. These factors, along with the express repeal of all inconsistent statutes, combine to destroy Petitioners' argument that the states have exclusive power to impose taxes upon the severance of oil and gas from the reservation. State power to tax non-Indian interests in production, if it exists, is grounded in common law.[15]

D. *The 1927 Leasing Act And Its Legislative History Is Devoid of Any Indication That Congress Intended To Divest Tribal Taxing Authority.*

The 1927 Leasing Act was one of several in less than a decade to authorize state taxation of private mineral development activities on federal and Indian lands. The state taxing provision which had appeared in previous acts became a kind of legislative boilerplate that appeared every time Congresss legislated on the subject of federal leasing policy. The legislative history shows that by 1927 state taxation was widely accepted by Congress and rarely debated.

Although the 1927 Act makes no explicit reference to severance taxation by the tribes, Amoco and Merrion Petitioners argue that Congress implicitly intended to divest tribal taxation as part of a unique legislative compromise necessary to secure passage of the Act. Peti-

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[15] *See Moe* v. *Salish and Kootenai Tribes, supra*; and *Washington* v. *Colville, supra*; the question of whether the states have common law authority to tax non-Indian lessees on the reservation is not an issue in this case.

tioners assert that a congressional power bloc wanted to deny the tribes any royalty rights in Executive Order reservations on the grounds that Tribes had no proprietary rights in such reservations, and the state tax provision was the necessary trade-off to recognize the tribes' royalty rights (M&B Br. at 31; Amoco Br. at 20-21).

This claim is incorrect for two basic reasons. First, the 1927 Act is anything but unique, since it accorded Executive Order tribes the same royalty rights as treaty tribes. Second, the legislative history shows that at no time did more than a handful of Congressmen advocate the anti-Indian position described by Petitioners. Congressional sentiment was overwhelmingly in favor of recognizing tribal royalty rights in Executive Order reservations, and there was never any compromise based on this point.

Prior to congressional enactments providing for state taxation of leasing activity on federal and Indian lands, state efforts to tax lessees' interests in production were rejected through the application of the "federal instrumentality" doctrine.[16] In 1915 Congress considered but failed to enact a leasing bill that appears to have provided the first general authorization for state taxation of leasing activity on federal lands.[17] This law included a provision disclaiming any intent to preclude state taxing jurisdiction. Indian leasing legislation containing a

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[16] *Choctaw, Oklahoma and Gulf Railroad Co.* v. *Harrison*, 235 U.S. 292 (1914), *Howard* v. *Gipsy Oil Co.*, 247 U.S. 503 (1918) (per curiam), *Large Oil Co.* v. *Howard*, 248 U.S. 549 (1919) (per curiam), *overruled in Oklahoma Tax Commission* v. *Texas Co., 336 U.S. 342 (1949); Oklahoma Tax Commission* v. *Barnsdall Refineries*, 296 U.S. 521 (1936)

[17] 53 Cong. Rec. 1122 (1916).

similar state tax proviso was enacted in the Act of June 30, 1919, 25 U.S.C. §399 (1976). The state taxing provision of this Act was neither explained nor debated, but simply incorporated from earlier versions of the same measure.[18]

Subsequent to the passage of the 1919 Act, Congress enacted three laws regulating leasing on Indian lands, all of which contained state tax disclaimer provisions derived from the 1919 Act.[19]

In 1920 Congress enacted general leasing legislation which standardized all leasing activity on federal lands and provided for the establishment of a statutory standard for the disposition of rents and royalties from oil, gas and mineral leases. The state tax disclaimer was taken word for word from the final version of the 1919 Act and was neither altered nor discussed as the Bill progressed to the Senate and House and then was signed into law by President Wilson on February 25, 1920.[20] Under the royalty formula in Section 35 of the 1920 Act, a percentage of all royalty revenues derived from activities within a state were to be paid to that state while the remainder went to the federal government.[21]

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[18] H.R. Rep. No. 4, 66th Cong., 1st Sess., 1-5 (1919).

[19] Act of May 29, 1921, §26, 41 Stat. 1249 (1921); Act of March 3, 1921, §5, 41 Stat. 1250 (1921); Act of May 29, 1924, 25 U.S.C. §398 (1976).

[20] Mineral Leasing Act of 1920, §32, 41 Stat. 450 (1919), 30 U.S.C. §189 (1976).

[21] Mineral Leasing Act of 1920, §35, 41 Stat. 450 (1919), 30 U.S.C. §191 (1976). The royalty formula was modified in 1976. *See* Pub.L. 94-579, Title III, §317(a), 90 Stat. 2770 (1976), 30 U.S.C. §191 (1976).

Passage of the 1920 Act left an inadvertent hole in federal leasing law. Existing Indian leasing acts applied only to land "occupied by Indians who have bought and paid for the same" — language construed to include treaty and statute reservations only, thereby excluding reservations created by Executive Order.[22] Tribes on treaty reservations therefore were able to lease their mining rights and realize steady royalty income, but tribes on Executive Order reservations had no statutory authority to lease. This problem was compounded as the 1920 Act applied only to lands "owned by the United States"[23] and the immediate question was whether Congress intended that term to include Executive Order reservations; if so, then serious equitable problems arose with respect to application of the royalty formula to Executive Order reservations. That formula divided royalty revenues between the state and federal governments with 37 1/2% going to the former and 62 1/2% to the latter. Therefore, it allocated no royalties to tribes on Executive Order reservations.

Within weeks of the enactment of the 1920 Leasing Act a bill was introduced to extend the 1920 Act to "unallotted lands within Indian Reservations" which was endorsed by the then Secretary of the Interior.[24] The bill credited all royalties to the tribes and did not mention state taxation.

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[22] Act of February 28, 1891, 25 U.S.C. §397 (1976); *see British-American Oil Producing Co.*, v. *Board of Equalization*, 299 U.S. 159, 162 (1936).

[23] Mineral Leasing Act of 1920, §1, 41 Stat. 437 (1919), 30 U.S.C. §181 (1976).

[24] H.R. 13851, 66 Cong. 2nd Sess. (1920).

The Harding Administration and its Secretary of the Interior Albert B. Fall assumed office three months later. In a tacit repudiation of the Interior Department's prior position, Secretary Fall ruled in 1922 that Indian reservations created by Executive Order were lands "owned by the United States" within the purview of the 1920 Leasing Act and subject to the leasing provisions of that Act[25] thereby temporarily forestalling corrective legislation. Secretary Fall's opinion is the foundation of Petitioners' argument based on the 1927 Act (Amoco Br. at 19).

In 1923 the newly appointed Secretary of the Interior, Hubert Work, recommended the enactment of new legislation in a letter to the Chairman of the Senate Committee on Indian Affiars.[26] In 1924 a draft bill was introduced in the Senate which provided that the Secretary deposit all leasehold royalties in an interest bearing account to the credit of the leasing tribe.[27] There

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[25] E.M. Harrison, 49 L.D. 139 (June 9, 1922), *reprinted in Hearings on H.R. 9133 Before a Subcommittee of the House Committee on Indian Affairs*, 69th Cong., 1st Sess., 73-77 (1926). Secretary Fall's decision angered his subordinates of the Indian Bureau, who favored the enactment of remedial legislation on the grounds that leasing under the 1920 Act was unfair to tribal members and inconsistent with congressional intent. *Id.* at 20-21 (testimony of Charles H. Burke, Commissioner of Indian Affairs).

[26] S. Rep. No. 669, 68th Cong. 1st Sess., 1-2 (1924).

[27] The text of the bill appears at 66 Cong. Rec. 999 (1924). Senator Harreld, the bill's sponsor, succinctly explained the need for legislation: "Secretary Fall made a ruling which embarrasses the present Secretary very much. He made a ruling that royalties or bonuses obtained from Executive Order Indian lands should be deposited to the credit of the United States. That ruling has not been followed in other cases." *Id.* at 998.

was no provision authorizing state taxation of lease related activities, features included in later drafts of the bill.

Other relevant events occurred in 1924. Attorney General Harlan F. Stone reversed Secretary Fall's decision, concluding that the 1920 Act did not apply to Executive Order Indian reservations. 34 Op. Atty. Gen. 171 (1924). Also, legislation was introduced to extend the mineral leasing authorization period of the 1891 statute (25 U.S.C. §397) for oil and gas leases from ten years to "ten years, and as much longer as oil and gas shall be found in paying quantities." The House Committee added a provision to this statute consenting to state taxation, which the Interior Department did not oppose. *See* H.R. Rep. No. 386, 68th Cong., 1st Sess. 2 (1924). The bill passed without controversy and is now codified at 25 U.S.C §398.

The Senate continued discussion of the new legislation recommended by Secretary Work. A companion bill was reported and passed by the House in 1925 which preserved the tribal royalty feature of the Senate bill and added a state taxing provision similar to those in the 1921 and 1924 Acts.[28] The state taxing provision was temporarily deleted but then restored in the version of the bill that passed the Senate during the next session of Congress. At the Senate hearings, there was intially an assumption that Indian tribes opposed the provision giving states the authority to tax.[29] The American Indian

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[28] H.R. Rep. No. 1254, 68th Cong., 2nd Sess. 3-4 (1925).

[29] See 66 Cong. Rec. 5433 (1925), attributing to the Senate the view that "it was improper to grant to the States the unlimited power to tax, because the power to tax is the power to destroy."

Defense Association, however, endorsed the state taxing provision and urged the adoption of the Act.[30] There was dissatisfaction with the royalty formulas contained in earlier versions of the legislation which provided that 62 1/2% of the royalty revenues to be allocated to Indian tribes while the state share was required to be spent on education and roads on the Indian reservations.[31] Therefore, the Senate discarded the entire royalty formula and it never reappeared.

Committees of both Houses reported out bills giving the tribes all royalities but authorizing state taxes (S. 4152, H.R. 9133), and one of these passed. *See* 67 Cong. Rec. 10912-25, 11379-96 (1926). It was vetoed by the President based on a provision, unrelated to the present controversy, trying to deal equitably with parties who had obtained leases under, or otherwise relied on, Secretary Fall's 1922 opinion before it was reversed by Attorney General Stone in 1924. 67 Cong. Rec. 12641 (1926).

In 1927 bills were introduced identical to the one passed in 1926 except for the provision dealing with the 1922-1924 claimants. *See* 68 Cong. Rec. 4580 (1927). These became 25 U.S.C §§398a-398e.

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[30] "[T]he American Indian Defense Association indorses the idea that these Executive order reservations and the treaty reservations should, from their oil, gas, and mineral output, yield a revenue to the States. So far as I know, on that issue also there will be no difference of opinion among the Indian welfare bodies and I know of no Indian who objects." *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate on S.1722 and S.3159*, 69th Cong., 1st Sess., 68-69 (1926).

[31] 66th Cong. Rec. 5433 (1925). *See also Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate*, on S.1722 and S.3159, 69th Cong., 1st Sess., 2 (1926), and S.Rep. No. 768, 69th Cong., 1st Sess., 6 (1926).

Petitioners base their "compromise" argument on the royalty allocation provision adopted by the Senate in 1925 and abandoned in 1926. They equate this provision with Secretary Fall's 1922 opinion and argue that the Senate, like Fall, was denying the tribes any mineral royalty rights in Executive Order reservations. *See* Amoco Br. at 19. This is plainly incorrect. Secretary Fall's view gave the Indians nothing at all. The 1925-1926 apportionment provision gave the Indians the major share of the royalties as previously stated and required the state's royalty share be spent only for roads and education on Indian reservations.

Secretary Fall's view that the Indians should get no royalties never had significant support in Congress. No bill was introduced adopting it, and no committee endorsed it, much less either House. To be sure, it had a few advocates (generously quoted by Petitioners) such as Senator Bratton, who had succeeded Albert Fall as Senator from New Mexico. But he was "the only member of the committee who dissented" from the 1925 bill. 67 Cong. Rec. 10920 (1926). In 1927 he admitted that the sentiment in the Senate was "overwhelmingly in favor" of the bill that passed, treating Executive Order tribes the same as treaty tribes. 68 Cong. Rec. 2793 (1927).

Instead of the formula allocation, Congress adopted the provision giving the Indians all the royalities but authorizing state taxation on the same terms as the 1924 Act for treaty reservations (25 U.S.C. §398) and the 1921 and 1924 special Acts for particular reservations (none of which had been set aside by Executive Order). *See* note 19 *supra*. Rather than representing a unique compromise, the statute was fully consistent with the objectives of leasing statutes from 1916 on, and as a result

treated Executive Order reservations the same as treaty reservations.

This history and the statutory language demonstrate that the 1927 Act was not unique, nor was it based on any compromise that derogates governmental powers of tribes over their reservations. The Executive Order tribes, and the treaty tribes under the 1921 and 1924 Acts, had mineral production on their reservations subjected to state taxes in identical terms. None of these laws adverted to tribal governmental powers.

In the absence of any indication that Congress intended to divest the tribes of any attributes of inherent sovereignty, it cannot now be assumed, over fifty years later, that Congress did so intend. As previously established, divestiture of inherent attributes of sovereignty may not be lightly inferred. Congressional intent to divest "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history". *Bryan*, 426 U.S. at 393.

Petitioners have failed to demonstrate that Congress by enacting either the comprehensive 1938 Leasing Act or the 1927 Leasing Act intended to preclude Indian tribes from exercising their inherent authority to tax mineral development activities on reservations.

E. *The Objective of the Mineral Leasing Act Regulations is to Protect Tribal Interests.*

Petitioners argue that Congress has preempted the field of taxation of oil and gas on Executive Order Indian reservations by enacting 25 U.S.C. §398(c) and as the result of adoption by the Secretary of Interior of a total federal regulatory scheme (M&B Br. at 29-35).

In the first place, 25 U.S.C. §398(c) is not relevant to these leases, and secondly, the regulations referred to by Petitioners were adopted pursuant to the authority of the 1938 Act (*see* p. 33 n.14 *supra*). The 1938 Act carried out the objectives of the Indian Reorganization Act, which were to promote tribal economic development and to ensure tribal control over disposition of reservation lands and resources. Section 16 of that Act provided that the Constitution adopted by a tribe should vest in the tribe, among other rights and powers, the power to "prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments."

It is true that Section 4 of the 1938 Act, 25 U.S.C §396(d), provided that all operations under any oil, gas or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands would be subject to the rules and regulations promulgated by the Secretary of the Interior; nevertheless, the Secretary recognized that tribes organized under the IRA should have the authority to adopt their own leasing and operating regulations. 25 C.F.R. §171.29 provides:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C., and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

This Section, first adopted on December 24, 1957, 22 Fed. Reg. 10588, is a further confirmation of congressional and Interior Department objectives that organized tribes, when able, should take over the management of oil and gas operations on their reservations.

Proposed amendments of 25 C.F.R. Part 171 were published in the Federal Register August 11, 1980. The purposes and scope of the amended regulations are set forth as follows:

> **§171.1 Purpose and scope.**
>
> (a) The regulations in this part govern contracts for the prospecting for and mining of Indian-owned minerals, other than oil, gas and coal. These regulations are intended to ensure that Indians desiring to have their mineral reserves developed receive, at least, fair market value for their ownership rights; to ensure at the same time that any adverse environmental or cultural impact on Indians, resulting from such development, is thoroughly considered and possibly minimized; and to allow *Indian mineral owners to enter into contracts which reserve to them the responsibility for overseeing the development of their mineral reserves*. 45 Fed. Reg. 53165 (emphasis added).

These regulations were not finalized on the date of writing of this brief. However, the authorization proposed for contracting by Indian mineral owners, reserving to them the responsibility for overseeing the development of their mineral reserves, clearly indicates an understanding on the part of the officials of the Department of Interior that the development of Indian resources is not to be confined within an inflexible leasing structure.

Many tribes in recent years have negotiated joint venture contracts and other development contracts other than leases. An October, 1975 publication of the Bureau

of Competition, Federal Trade Commission, entitled "Staff Report on Mineral Leasing on Indian Lands", noted that none of the technical requirements of the regulations were sacrosanct, citing 25 C.F.R. §1.2. *See* Report at 18. The report quoted a former Associate Solicitor for the Division of Indian Lands, Department of the Interior, as follows:

> In short, the Indians and the Department can be quite flexible in their approach to leasing. The regulations have been characterized as a 'rock bottom protection of Indians and the Bureau of Indian Affairs against scalping by mining company officials'. *Ibid.*

This report emphasizes the correctness of the position of the tribes — that the regulations are intended to protect the tribes, not to prevent the tribes from exercising reasonable controls over development of their minerals.[32]

Petitioners' arguments that the comprehensive federal regulatory scheme precludes imposition of any

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[32] The Report stated in a section entitled "Flexibility of Indian Land Mineral Leasing Program", as follows:

> The primary characteristic of Indian land leasing is its inherent flexibility. The basic statutes governing leasing of Indian land, summarized above, are quite general, mandating few specific procedures to be followed. This contrasts dramatically with the far more detailed provisions of the Minerals Leasing Act of 1920, 30 U.S.C. §§181-237, which governs mineral leasing of public lands. The regulations pursuant to these Indian lands statutes, while significantly more technical than the statutes themselves, are also far less detailed than those pursuant to the Minerals Leasing Act, collected in 43 C.F.R. Parts 3100-3560. None of the technical requirements of the regulations, moreover, are sacrosanct. By 25 C.R.R. [sic] §1.2, the Secretary of the Interior "retains the power to waive or make exceptions to [these] regulations . . . in all cases permitted by law [where he] finds that such waiver or exception is in the best interest of the Indians."

additional burdens by the Tribe, particularly any unilateral increase in the rate of rental or royalty, ignore the major objective of the regulations, that is, to protect the Indian land owner. Petitioners take the language of *White Mountain Apache Tribe* v. *Bracker, supra,* and pervert the preemption doctrine to support their theory that the doctrine would be equally applicable to taxes that would reduce *Petitioners' profits*. No case has so held, nor has any case held that Petitioners are or should be protected against taxation by tribes, or against changes in the regulations other than changes in rentals or royalties. Paragraph 3g of the standard lease requires lessees to abide by and conform to any and all regulations of the Secretary of the Interior, now or hereafter enforced relative to such leases (except that changes in the rate of royalty or annual rental cannot be unilaterally changed). Section 171.29, adopted in 1957 (*see* p.44 *supra*), providing that the tribes could supersede the Secretary's regulations, gave Petitioners fair warning that they were subject to regulation both by the Secretary and the Tribe.

The Tribe concedes that, as a proprietor, it must comply with the provisions of the leases. However, as a sovereign government, the Tribe's power to tax, like that of a state, is limited only by constitutional provisions, law and regulations applicable to this aspect of sovereignty.

The power to tax is an attribute of sovereignty separate from the power to regulate. The power to regulate is not at issue in this case, because there is no claim or evidence in the record that the Tribe has made any attempt to exercise that power over Petitioners.

ARGUMENT III

The Jicarilla Apache Severance Tax Is Not Inconsistent With Any Interest Of The National Government Or National Energy Policy

The relevant national policy considerations raised in this case are those of tribal economic development and self-determination. Congress' policy to promote Indian economic development has been amply demonstrated. The Indian Financing Act of 1974, 25 U.S.C. §§1451 *et seq.*, states:

> It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources . . . comparable to that enjoyed by non-Indians in neighboring communities.

As well, the Indian Self-Determination and Education Assistance Act of 1974, 25 U.S.C. §450 *et seq.*, and the Indian Reorganization Act are clear examples of the congressional determination that tribes should more fully control their economic futures.

Even in face of these congressional policies Petitioners argue that the Jicarilla Apache severance tax undermines the long standing congressional policy favoring leasing and development of oil and gas reserves on Indian land "pursuant to uniform federal standards" and that the severance tax undermines the national interest in promoting the development of domestic oil and gas resources and curbing inflationary energy costs (Amoco Br. at 24-29; M&B Br. at 29-35).

It is questionable whether there is a viable or consistent national energy policy. A Department of Energy

study completed in July 1980 concludes that inconsistent government actions have nullified each other.[33] Tribal taxes on oil and gas production cannot impose a significant burden on operators or consumers since oil and gas production on Indian lands in the United States is an insignificant fraction of total United States production. Oil production on Indian lands in 1979 (23.8 million barrels) was less than 1% of total United States production of 3.1 billion barrels, and gas production on Indian lands in that year (118.3 billion MCF) was less than 1/10 of 1% of total United States production of 19.6 trillion MCF.[34]

Lessees on Indian lands engage in extensive operations including geophysical and seismic exploration, drilling of wells, laying of pipelines and cutting roadways which disturb the surface of reservation lands and have a significant impact upon the environment and economy of the reservation and the culture and daily lives of tribal members. The State of New Mexico does not regulate that activity, nor does it provide services designed to mitigate the impact of these operations. The United States Geological Survey shares the responsibility with the Bureau of Indian Affairs in performing environmental assessments, and supervising drilling and production operations. If there were in fact an inconsistency be-

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[33] *See* Energy Programs-Energy Markets, July, 1980, DOE-EIA-0201-16. This study is summarized by William D. Nordhaus, former member of President Carter's Council of Economic Advisors in an article in the New York Times entitled *Energy Policy — Mostly Sound and Fury*, Nov. 30, 1980, Financial Section, at 2.

[34] *Geological Survey, U.S. Dept. of Interior Federal and Indian Lands, Oil and Gas Production, Royalty Income and Related Statistics*, June 1980. Indian production at 73; total U.S. production at 383.

tween the Indian tribal policy of securing revenues to assist in supervising oil and gas operations and protecting the environment on the reservation, and a national policy of encouraging production of oil and gas, any such inconsistency must be considered in light of the express policy of the Congress in encouraging Indian self-determination and encouragement of strengthening of Indian tribal governments. Congress could not have intended tribes to support their governments by self taxation alone, leaving giant corporations to exploit tribal resources tax free.[35]

Congress moreover has expressly recognized Indian severances taxes in the Natural Gas Policy Act of 1978, wherein state severance taxes are defined to include taxes imposed on the production of natural gas by any state or Indian tribe (15 U.S.C. §3320). Producers are permitted to sell gas at a price in excess of the maximum lawful price to the extent necessary to recover state and Indian severance taxes, with certain limitations. *Ibid.* Since Congress has recognized Indian severance taxes in this most recent legislation, imposition of these taxes cannot be deemed to be inconsistent with any national policy.[36]

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[35] Neither the tribes nor individual tribal members can provide the tax base to support tribal governments. Contrast the low per capita and total income of Indians in the United States with the net earnings of five of the larger companies which are parties to this litigation shown in the Tribe's Brief in Opposition to Writ of Certiorari herein, p. 6 n.5.

[36] Recognition by the Congress of this case in the Tenth Circuit did not preclude the treatment of Indian severance taxes in the same manner as state imposed severance taxes. *See* Conference Report on the Natural Gas Policy Act of 1978, H.R.Rep. No. 95-1752, 95th Cong. 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Adm. News 8983.

ARGUMENT IV

The Tribal Severance Tax Levied Upon The Privilege Of Extracting Minerals On The Reservation In No Way Violates The Commerce Clause Of The United States Constitution

A. *The Tribal Severance Tax is Levied Upon Local Activity.*

The Jicarilla Apache severance tax is an excise or privilege tax on the local business of producing oil and gas on the Tribe's reservation measured by the volume of production at the wellhead. By the language of the tribal severance tax Ordinance, it is "imposed on any oil and natural gas severed, saved and removed from Tribal lands", that is, extracted from tribal soil (J.A. 38). It is levied on all crude oil, condensate and natural gas "produced" on the reservation (*Id.* at 39, paras. 2 and 3). The tax is paid by the operator of each well. Each operator is required to file a return showing the total volume of each well each calendar month (*Id.*, para. 6). The taxable event on which the tribal tax is imposed is the severing, saving and removal of oil and gas from reservation soil.

The Amoco Petitioners argue that the language "severed, saved and removed from Tribal lands" means that "the Jicarilla Ordinance in fact applies only to the shipment of goods *off* the Reservation, not the act of severance *on* the Reservation" (Amoco Br. at 37). This erroneous assertion is made even in the face of the express provisions of the Ordinance that the taxes are due at the time of severance (J.A. at 38, para. 1).

The State of New Mexico has enacted severance taxes on coal and uranium employing similar language. The severance tax on coal provides:

> The severance tax on coal is measured by the quantity of coal severed and saved. The taxable event is the sale, transportation out of New Mexico or consumption of the coal, whichever first occurs. Upon each short ton (two thousand pounds) of coal severed and saved there shall be imposed on the severer a severance tax of fifty-seven cents ($.57). N.M. Stat. Ann. §7-26-6 (1978).

The severance tax on uranium provides:

> The severance tax on uranium is measured by the quantity of U_3O_8 contained in and recoverable from severed and saved uranium-bearing material whether that material is ore or solution, measured in a standard manner established by regulation of the director of the revenue division of the taxation and revenue department. The taxable event is the sale, transportation out of New Mexico or consumption of the uranium-bearing material, whichever first occurs. N.M. Stat. Ann. §7-26-7 (1978).

Neither of these taxes has been challenged as imposing a prohibited tax on interstate commerce, nor have taxes using similar language been challenged in other states.[37]

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[37] The State of Arkansas levies a severance tax on natural gas at the rate of 5% of the market value *at time and point of severance.* Ark. Stat. Ann. §§84-2102(e) *et seq.* (1980). "Sever" means natural resources cut, mined, dredged or otherwise taken or *removed.* "Point of severance" is defined to mean the place on which transportation has been or is about to be commenced for their use or processing after being severed. "Time of severance" is defined to mean the date on which transportation has been or is about to be commenced for their use or processing after being severed. The Arkansas severance tax was upheld in *Floyd* v. *Miller Lumber Co.*, 160 Ark. 17, 254 S.W. 450 (1923).

Clearly the taxable event on which the tribal severance tax is imposed is the severing, saving and removing of oil and gas from reservation soil. The Courts have unanimously held that such production or mining of natural resources is a distinctly local event, occurring before the products move into interstate commerce. Taxes which are applied evenhandedly to such severance of gas or oil or production of minerals do not constitute an unconstitutional burden upon commerce. *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923); *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284 (1927); *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *see Alaska* v. *Arctic Maid*, 366 U.S. 199 (1961); *Dunbar-Stanley Studios, Inc.* v. *Alabama*, 393 U.S. 537, 541 (1969).

In *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. at 174-75, the State of Minnesota enacted a tax to subject all those " 'engaged in the business of mining or producing iron ore or other ores' within the state to the payment in each year of 'an occupation tax' equal to 6 percent of the value of ore mined or produced during the preceding year — such tax to be in 'addition to all other taxes.' " The statute directed that the tax be computed on the value of the ore at the place where it is " 'brought to the surface of the earth,' less certain deductions. . . ." *Id.* at 175. The law was attacked on the basis that it imposed a tax on mining which, although not actually a part of interstate commerce, was so closely connected therewith that to tax it was to burden or interfere with such commerce in violation of the Commerce Clause of the Constitution of the United States.

The taxpayers argued that since less than two percent of the iron ore mined by the taxpayers was consumed within the state and practically all of the output of

the mines was shipped to fill existing contracts with consumers out of state, there was a practical continuity of movement from the mining operation to the loading on cars for interstate shipment, which made the mining a part of interstate commerce. This Court responded to taxpayers' argument stating:

> Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing is a local business, subject to local regulation and taxation (citations omitted). Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce (citations omitted).
>
> The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference. *Id.* at 178-79.

In *Hope Natural Gas Co.* v. *Hall*, the Supreme Court of Appeals of West Virginia had modified a lower court decree so as to permit Defendant state officers to impose and enforce a tax, "upon the natural gas produced by the plaintiff, based upon the value thereof within the state and before it enters interstate commerce. . . ." *Hope*, 274 U.S. at 287.

The Plaintiffs in Error owned 3,178 producing wells in twenty-five counties in West Virginia, most of which passed into interstate commerce by continuous movement from the wells. Counsel for Plaintiffs in Error admitted that, without violating the Commerce Clause, the

state could lay a privilege or occupation tax upon producers of natural gas measured according to value of the commodity at the well. They argued, however, that the statute as construed by the highest court of the state would subject the gross receipts derived from interstate commerce to the tax. The Court stated in dismissing the argument:

> The plain result of the opinion and final decree is to require that the tax be computed upon the value of the gas at the well, and not otherwise. If, hereafter, executive officers disregard the approved construction and fix values upon any improper basis appropriate relief may be obtained through the courts. *Id.* at 288.

As was true of the tax in *Hope Natural Gas Co.* v. *Hall*, the volume of production on which the Jicarilla severance tax is measured and determined is at the wellhead, as provided by paragraph 6 of the Ordinance which requires producers to report the "total volume of oil, gas and condensate and BTU of gas produced from each well. . . ." (J.A. 39). Measurements must necessarily be taken at the wellhead because the gas is commingled with gas from other wells when taken into gathering lines. Crude oil is stored in holding tanks at the site of each well and hauled off from the well site in a tanker truck in which it may be commingled with oil from other wells.[38]

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[38] Petitioners' reliance on *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954) is misplaced. That case involved the imposition of a Texas tax on the occupation of "gathering gas" where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the state for the purpose of immediate interstate transmission. While the oil and gas severed from the reservation flows into interstate commerce, the tribal tax

B. *The Jicarilla Apache Tribal Severance Tax Does Not Discriminate Against Interstate Commerce.*

The District Court held that the Jicarilla Apache tax imposed discriminatory burdens on interstate commerce, and together with the various production taxes levied by New Mexico, a multiple burden on interstate commerce. This holding was rejected by the Court of Appeals. *Merrion*, 617 F.2d at 544-46, *reprinted in* J.A. 152-56.

The threshold question that must be answered, not addressed in the courts below, is whether the Indian Commerce Clause or the Interstate Commerce Clause of the Constitution (U.S. Const. art. I, §8, cl. 3) in themselves impose any implied restraints on actions of Indian tribes in light of the fact that Congress has not expressly legislated so to limit tribes.

The Commerce Clause provides: "Congress shall have the power . . . To regulate Commerce . . . with the Indian tribes; . . ." and constitutes a delegation by the states to the federal government of that power. It has as its primary purpose the protection of Indians from outside trade interference and alienation of their lands without the consent of Congress. *See* F. Cohen *supra* at 91, n.22, 348-49. Under the established doctrine of the plenary powers of Congress to regulate non-Indians engaged in commerce with tribes, Congress has affirmatively acted under the Indian Commerce Clause to assure protection of Indian commerce. *See* the Trade

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is upon the privilege of extracting oil and gas, and therefore, the *Michigan* case is inapplicable. As noted by the Court, Texas also levies on producers a tax of 5.72% of the value at the well of all gas produced in the state. *Id.* at 163.

and Intercourse Acts,[39] and the Mineral Leasing Acts, Argument II E, *supra*.

Restraints on tribal control over reservation trade, based on the Indian Commerce Clause, cannot be implied. It is therefore necessary to look for specific congressional acts to determine whether Congress has in any way acted to restrict the tribes' sovereign powers to tax. As discussed in Argument II above, Congress has not done so. Rather, Congress has acted to affirm tribes' power to regulate their own affairs, including taxation of their finite resources. *See* discussion of the Indian Reorganization Act, pp. 22-24 *supra*.

Moreover, the Court has never held that the Indian Commerce Clause or the Interstate Commerce Clause has limited the power of Indian tribes to regulate non-Indian business activity on reservations absent express congressional action. The tribal power to exclude non-Indians from tribal territory, incorrectly argued by Petitioners as the only basis for tribal taxing power, is inconsistent with a theory that the tribes cannot engage in activity which may restrict commerce originating on their reservations.

For these reasons it is submitted that Petitioners' arguments based on violations of the Interstate Commerce Clause of the Constitution are misplaced. Nevertheless, judging the Jicarilla Apache tax by criteria heretofore applied by this Court to similar state taxes on production of oil, gas and minerals, the tax must be upheld under the Commerce Clause of the Constitution.

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[39] For example, the Acts of July 22, 1790, 1 Stat. 137; March 30, 1902, 2 Stat. 139; June 30, 1834, c. 161, §12, 25 U.S.C. §177; July 31, 1882, 22 Stat. 179, 25 U.S.C. §264.

Respondents do not argue with Petitioner's statements and supporting cases that state taxes on activities related to interstate commerce must be fairly apportioned, must have a substantial nexus within the taxing state, cannot discriminate against interstate commerce, and must be fairly related to services provided.[40] However, Petitioners consistently fail to acknowledge that the New Mexico and tribal severance taxes are impositions upon local activities by two separate governmental units within whose territorial limits and under whose jurisdiction the activities take place. The nexus requirement of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), is clearly met. As to the relationship between the services and privileges provided and the burden of the tax, the Tribe attempted to demonstrate this relationship, but the evidence was rejected by the District Court upon Petitioners' objections. *See* p. 7-8 *supra*. For these reasons, Petitioners' challenge must be limited to their allegations of discrimination and multiple burden.

Paragraph 4 of the Ordinance exempts only "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe. . . ." (J.A. 39) Paragraphs 2 and 3 of the Ordinance provides for the rate of tax on oil and gas "produced on the Reservation and sold or transported off the Reservation." (*Id.*)

The Amoco Petitioners argue that the Oil and Gas Severance Tax Ordinance discriminates between products taken off the reservation and those utilized on it.

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[40] Theoretically, even if these standards were applied to Respondents' tax, the Court of Appeals analysis in its footnote 4 would be dispositive (J.A. 154).

Paragraphs 2 and 3, construed with the exemption in paragraph 4, were designed to ensure that all oil and gas not used by lessees in aid of production or used by the tribal government *for tribal purposes* would be subject to the tax. All oil and all gas, except pipeline production, is sold at the wellhead. Pipeline producers transport their production off the reservation without sale, hence, the necessity for the wording "transported off the reservation" in paragraph 2 and 3 of the Ordinance.[41] The language of the tax ordinance ensures the equal taxation of all oil and gas produced on the reservation, including pipeline production, exempting only that used by lessees in aid of production or used by the Tribe for tribal governmental purposes.[42]

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[41] Similar language is contained in the State of New Mexico's Resource Excise Tax Act. N.M. Stat. Ann. §§7-25-1 to -9. §7-25-3, paragraph I defines "taxable value" as the value of the product after severing. This section provides that:

> All natural resources severed or processed in New Mexico shall be included in determining taxable value, regardless of the place of sale or the fact that delivery may be made to points outside of New Mexico. If any person shall ship, transmit or transport natural resources out of New Mexico without making sale of them, or shall ship, transmit or transport natural resources out of New Mexico in an unfinished condition, the value of the natural resources in the condition in which they existed when shipped, transmitted or transported out of New Mexico and before they enter interstate commerce, without deduction of any land other than specified in this subsection, shall be the basis for determining the taxable value.

[42] The tribal tax also exempts oil and gas consumed by Petitioners in connection with production (J.A. 39). We do not understand Petitioners to base their claim of discrimination on this provision. This kind of exemption is a common feature of state laws, e.g., Mont. Stat. Ann. 15-36-101, 103 (1977).

This Court has specifically upheld this type of classification and exemption in *Utah Power and Light Co.* v. *Pfost*, 286 U.S. 165 (1932). In that case, this Court held that a tax levied by the State of Idaho on the generation of electricity was a tax on a process which was essentially local and the Commerce Clause of the Constitution did not prevent the state from exercising exclusive control over its manufacture. The tax in *Utah Power and Light*, provided an exemption for the benefit of consumers of electrical power for irrigation purposes on land within the state. The Court held that the irrigation of lands in that arid region was a matter of public concern and exemption of this character was not precluded by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Court further interpreted a clause which provided for levy of the tax on "all electrical energy generated or produced, within the state, for barter, sale or exchange" as follows:

> That is, to put the matter concretely, the amount of the initial production must first be ascertained by measurement at the place of production, and from that there must be taken amounts used by the producer or consumed in effecting transmission (including so-called line or system losses), or disposed of otherwise than by barter, sale or exchange — the remainder only being subject to the tax.
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> * * *
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> Neither the validity of the tax nor its certainty is affected because it may be necessary to ascertain, as an element in the computation, the amounts delivered in another jurisdiction. *Id.* at 190.

A similar reasonable interpretation of paragraphs 2 and 3 of the Jicarilla Apache Oil and Gas Severance Tax Ordinance leads to the conclusion that the limitation of

the tax to oil or gas "sold or transported off the reservation" is to deduct amounts "used by the producer or consumed in effecting transmission" as stated in *Utah Power and Light, supra*, in addition to the specific exemption in the Ordinance of royalty gas, oil or condensate taken by the Tribe in kind and used by the Tribe (meaning the tribal government, not tribal members; tribal members as individuals are subject to the tax).[43]

Finally, the provision exempting the Tribe from its own tax is supported by numerous decisions of this Court holding that the Interstate Commerce Clause does not limit the proprietory operations of the states themselves. *Reeves, Inc.* v. *Stake*, _____ U.S. _____, 100 S.Ct. 2271 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349 (1908); *McCready* v. *Virginia*, 94 U.S. 391 (1877). The rule of *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), striking down a state statute establishing employment preferences for state residents, again has no application to Indian Commerce.

The Amoco Petitioners assert that the tribal severance tax on oil and gas is discriminatory in that it affects customers throughout the nation, and that since the Tribe has exempted itself from the tax, it will in some way gain a commercial advantage over business off

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[43] Although there is no exemption here for tribal members, *Utah Power and Light*, implies that an exemption for the benefit of tribal members would not be fatal to the tax. *See also*, the Indian Preference Acts, 25 U.S.C. §§44-47, 274, 472; *Morton* v. *Mancari*, 417 U.S. 535 (1974).

the reservation or outside the State of New Mexico. There is simply no evidence of discrimination in favor of local commerce. *See Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 329, 337 (1977); *Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959). This Court has shown reluctance to void local taxes based on theoretical preferences imagined by counsel. *See Mobil Oil Corp.* v. *Commissioner of Taxes*, _____ U.S. _____, 100 S.Ct. 1223, 1233 (1980).

The Petitioners also maintain that the tax is discriminatory in permitting the Tribe to resell its royalty share of production on the reservation, without incurring tax liability, and thereby foster the development of tribal subsidized industries on the reservation (Amoco Br. at 34). The supposed "competitive advantage over Petitioners and Petitioners' customers due to the existence of the discriminatory tax" (*Id.* at 34 n.44) is an absurdity. Because of the vintage pricing of natural gas under the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301, 3311 *et seq.*, and the myriad of pricing regulations pertaining to oil distribution and sale, we submit that the arguments made with respect to possible competitive advantage of the Tribe, cannot be seriously considered.[44] If

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[44] Natural gas ceiling prices applicable to this production for the month of December, 1980, ranged from $.361 per million BTU (mm BTU) for certain Rocky Mountain gas, $2.64 per mm BTU for new natural gas, $2.826 per mm BTU for stripper gas, to $4.692 for gas from tight formations. Order of the Director, Office of Pipeline and Producer Regulation, Oct. 27, 1980, 45 Fed.Reg. 73027-32. With respect to the tax on oil, it is submitted that it would be impossible to determine the price advantage, assuming Indian production were exempt from tribal severance taxes on oil, in view of the tier pricing of oil. "Tier 1 oil" sold on an average price of $13.02 per barrel in May 1979. The base price for computation

there were resident local producers other than the Tribe itself, they plainly would be liable for the tax.

The arguments of the Amoco Petitioners that the Jicarilla tax is unrestrained by the economic and political pressures that normally serve to curb a severance taxing power are also unrealistic. The Tribe's tax would affect new production as well as old production and if unreasonable, would influence economic development of the reservation to the detriment of the Tribe. Moreover, tribal members themselves are subject to price increases which might occur as a result of the tax. These arguments, again, must be viewed in the light of the purposes of the Indian Commerce Clause and the control over tribes exercised by the Secretary of Interior.

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of windfall profit on Tier 2 oil is $15.20, and for Tier 3 oil, $16.55, all of these adjusted for inflation. Prices for imported oil in November, 1980, ranged from $20.79 to $37.15 per barrel. *Oil and Gas Journal*, Nov. 24, 1980, p. 208. The windfall profits tax varies from 70% of the windfall profit on Tier 1 oil and 60% on the windfall profit on Tier 2 oil for large producers, and 30% tax on the windfall profit on Tier 3 for large producers, and for small producers on all three Tiers. Crude Oil Windfall Profits Tax Act of 1980, §§4987, 4989, Pub.L.96-223. The Petitioners do not suggest how it is possible to measure the impact of the state or tribal severance taxes on this crazy price structure.

C. *The Tribal Severance Tax Does Not Impose A Prohibited Burden on Interstate Commerce.*

Petitioners claim, contrary to the holding of the Court of Appeals, that the tribal severance tax on oil and gas constitutes a prohibited multiple burden on interstate commerce based on the fact that both the Tribe and the State of New Mexico levy taxes on the production of oil and gas on the Jicarilla Apache Reservation.[45] The District Court adopted the proposed finding of Petitioners that the combined state and tribal tax burden would amount to more than 29% of the interstate price of old gas and over 12 1/2% of the price of old oil (J.A. 130, Finding 36). This finding was not substantiated by any evidence in the record as noted on p. 6 *supra*. The argument that the Jicarilla tax would adversely affect development and extraction of oil and gas and other minerals has no foundation of fact in the record or elsewhere.[46] *See* pp. 6-7 *supra*.

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[45] New Mexico imposes six separate taxes on oil and gas production or equipment: the Oil and Gas Severance Tax, N.M. Stat. Ann. 1978, §§7-29-1 to -22; the Oil and Gas Conservation Tax, §§7-30-1 to -26; the Oil and Gas Emergency School Tax, §§7-31-1 to -25; the Oil and Gas Ad Valorem Production Tax, §§7-32-1 to -27; Natural Gas Processors Tax, §§7-33-1 to -22; and the Oil and Gas Production Equipment Ad Valorem Tax, §§7-34-1 to -20.

[46] The District Court's Finding No. 35 stated "that if the wells operated by Plaintiff cannot be operated profitably the plaintiffs would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe" (J.A. 130). This finding is meaningless because there was no evidence of probative value that wells would be operated unprofitably, and no evidence whatsoever that leases would be operated unprofitably. The leases provide for a term of 10 years and so long thereafter as oil and gas is produced in paying quanties "from said land", not from each *well* (J.A. pp. 22-23).

A detailed and comprehensive study of the impact of the tax on the consumer was made by Dr. Alfred L. Parker at the request of the Tribe (Res. App. A *supra*; *see* p. 4 *supra*). The study established that the tribal tax would increase the cost of gas to New Mexico consumers by only 6/10th of 1 cent per MCF (*Id.* at 16), and increase the cost to interstate consumers by 1/10 of 1 cent per MCF (Id. at 8). The report concluded that the impact on all consumers of oil and gas would be insignificant (Id. at 19-20).

Petitioners made no study of the impact of the tax on interstate or intrastate consumers. As noted in Respondents' Statement of the Case, p. 6, *supra*, Petitioners' witness Dugan testified that the total burden of the State of New Mexico and the Jicarilla proposed tax would be 20.4% of the price of old gas (R.IV, 58). No credible evidence was offered by Petitioners as to burden of the tax on producers, or on consumer prices. The tax is only one component of all elements included in the cost of service of gas (R.VI, 290).

Since Petitioners failed to translate the "burden" on wellhead price to "burden" on the consumer, represented by the price paid by the consumer, relying on the rejected *per se* rule of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951) (*see Merrion*, 617 F.2d at 545 n. 4, *reprinted in* J.A. 154 n.4), the lessees failed to build a factual foundation in the record to challenge the tax on the basis of excessive burden unrelated to services performed on the reservation (*see also* pp. 7-8, *supra*).

The argument that the tax may limit production by imposing undue burdens on producers becomes absurb when viewed in the perspective of the impact of the tax imposed under the Crude Oil Windfall Profits Act of

1980, Pub. L. 96-233, 94 Stat. 229. The stated objective of that Act is to generate $227.3 billion in tax revenue over the period the tax is in effect, from March 1, 1980 until the completion of a 33-month phase-out of the tax, the phase-out to begin not later than January 1991.[47]

There is no constitutional prohibition against multiple taxation of local activity. It "was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938). Prohibited taxes are those which are disproportionately imposed after products begin to move in interstate commerce by every state through which the products move. *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964).

The fact of the matter is that the Respondents' severance tax on oil and gas taxes is imposed upon a local activity. The additional fact that the State of New Mexico taxes the same local activity under its laws does not create a prohibited multiple burden on Petitioners.

The cases relied on by Petitioners involve multiple burdens imposed by different jurisdictions at geographically separate points in the flow of commerce.

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[47] Despite the impact of the Crude Oil Windfall Profits Tax which was effective March 1, 1980, the drilling of oil and gas wells during 1980 was the highest that it has ever been. The Oil and Gas Journal of January 9, 1981 reported that the number of rotary rigs active each week during the year in the United States averaged 2910, 224 more than the average during the previous record years, 1955. The 1980 average was 728 rigs more than the average for 1979 and climbed steadily throughout the year 1980 (*Journal*, at 24).

Here the tribal tax and state taxes are based on concurrent jurisdiction over the same situs, the Jicarilla Reservation. The Court expressly recognized that such taxes do not impose a prohibited burden in *Washington* v. *Colville*, 100 S.Ct. at 2084:

> There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other.

Every process taking place prior to sale or transportation in interstate commerce is a local transaction and may be subjected to a variety of local taxes. *See Chassaniol* v. *Greenwood*, 291 U.S. 584 (1934); *Federal Compress & Warehouse Co.* v. *McLean*, 291 U.S. 17 (1934). A state license tax on operation of a cotton compress was upheld in *Federal Compress*; a city tax on persons selling the same cotton was upheld in *Chassaniol.*

In *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), the Court of Appeals upheld the County's possessory interest tax on non-Indian lessees of land held in trust by government for the Fort Majove Indian Tribe. The Fort Mojave Tribe also imposed its own possessory interest tax. The Court responded to the Tribe's argument that the imposition of a possessory interest tax by both the County of San Bernardino and the Fort Mojave Tribe would constitute prohibited multiple taxation by stating:

> There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The Tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power. *Id.* at 1258.

There is thus no constitutional ban upon the imposition of non-discriminatory local taxes by two taxing authorities having jurisdiction; double taxation is a fact of modern life. *Colville*, 100 S.Ct. at 2084.

ARGUMENT V
The Oil Companies' Rights Are Fully Protected

The argument of Petitioners that indulgence of governmental sovereignty by Indian Tribes would effectively create foreign enclaves within the states governed by a privileged class who accept benefits without burdens of citizenship and who are unconstrained by the fundamental precepts of American law and thus free to "exploit, expropriate and expel other Americans" (M&B Br. at 37), is specious and irrelevant to this case.

Petitioners cite not one instance of expropriation or expulsion by Indians or Indian governments, nor do they cite one instance of deprivation of their property without due process of law or any action taken by individual Indians or Indian tribes which would impair the obligation of their contracts.

Petitioners rely on the sanctity of the their leases; nevertheless, at trial when the Tribe sought to introduce evidence of nonperformance of their contracts, they objected and the Court denied admission of evidence offered to establish that the Petitioners had come to Court with unclean hands. Counsel for Merrion and Bayless stated "I think all the other equitable issues don't have any relation if the tax is valid." (R.VI, 194). Counsel for the Tribe argued that if the Court were going to continue the temporary injunction or issue a permanent injunction, then the question of clean hands was relevant (*Id.* at 194-95).

The District Court denied admission of testimony and affidavits which would have established substantial breaches and non-performance by Defendents of their lease contracts (D. Exs. AA & BB, R.VI, 306-07; Ex. BB appeared as Ex. B to Defendent's Brief on Motion for Rehearing, R.I, 201-04).[48] Petitioners should not now be heard in their complaints of possible impairment of the obligation of their contracts.

If tribal actions were taken in the future to jeopardize the property rights of these lessees on the reservation, new questions would arise, not relevant to this case. *See Hope Natural Gas Co.* v. *Hall, quotation at* p. 55 *supra*. The forum granted to Petitioners herein is proof that remedies are available for adjudication of any grievances Petitioners may have pertinent to the issues in this case. The Circuit Court of Appeals held that "the Tribal Council, a duly constituted legislative body of the Tribe, by the terms of the severance tax ordinance (J.A. 42, para. 13), expressly consented to suits against the Tribe in the United States District Court or in the Jicarilla Apache Tribal Court." *Merrion*, 617 F.2d at 540, *reprinted in* J.A. 144-55.

The argument that persons should not be subjected to occupation or license taxes without the right to participate in the government imposing such taxes is one that has long since been settled adversely to Petitioners. The Circuit Court of Appeals of the Eight Circuit in *Barta* v. *Oglala Sioux Tribe*, 259 F.2d at 557, in discussing a license tax levied by the Oglala Sioux Tribe for

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[48] *See also Jicarilla Apache Tribe* v. *Supron Energy Corp.*,479 F. Supp. 536 (D.C.N.M. 1979)), where the Court held that the Secretary of Interior had breached his fiduciary obligation to the Tribe with respect to requiring diligent development of leases, offset drilling, and required additional royalty accounting pursuant to the terms of the leases.

grazing and farming on tribal lands by nonmembers of the Tribe, stated as follows:

> It is finally argued that the tax is violative of defendants' rights in that it constitutes taxation without representation. If it be conceded that the act of the tribe in levying this tax constitutes taxation without representation that alone is certainly not fatal. The taxability of property is not dependent upon the residence of the owner of the property. The property rights of an alien or nonresident are taxable the same as the property of residents who may be said to have representation. *Citing Thomas* v. *Gay*, 169 U.S. 264 (1898).

See also Hagar v. *Reclamation District*, 111 U.S. 701, 709 (1884).

Furthermore, any action of the Tribal Council of the Tribe in changing the existing Severance Tax Ordinance would be subject to Secretarial approval, and to judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. §§701-706.

Finally, and perhaps most importantly, the Congress of the United States to which Petitioners have full access exercises plenary power over Indian affairs.

Conclusion

For the foregoing reasons, the Opinion of the Court of Appeals for the Tenth Circuit should be affirmed.

Dated: January 22, 1980.

Respectfully submitted,

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